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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
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THE INTERNATIONAL PROTECTION OF CULTURAL PROPERTY

Summary report on the second session of the Unidroit study group
on the international protection of cultural property, held at the
seat of the Institute from 13 to 17 April 1989

(prepared by the Unidroit Secretariat)

Rome, June 1989

1. The second session of the study group on the international protection of cultural property was opened at the seat of Unidroit by the President of the Institute, Mr Riccardo Monaco, at 10.15 a.m. on 13 April 1989. In greeting the participants (for the list of which see APPENDIX I), he addressed particular words of welcome to Messrs Ajala, Chatelain, Rodotà and Sanchez Cordero who were taking part for the first time in the work of the group.

Item 1 on the agenda - Adoption of the draft agenda

2. The group approved the draft agenda as proposed by the Secretariat (see APPENDIX II).

Item 2 on the agenda - Feasibility and desirability of drawing up uniform rules relating to the international protection of cultural property

3. In introducing this agenda item the Chairman drew attention to the following documents which had been prepared for the session:

Study LXX - Doc. 10: Summary report on the first session of the Unidroit study group on the international protection of cultural property, held at the seat of the Institute from 12 to 15 December 1988 (prepared by the Unidroit Secretariat).

Study LXX - Doc. 11: Preliminary draft Convention on the restitution and return of cultural objects (prepared by the Unidroit Secretariat).⁽¹⁾

Study LXX - Doc. 12: Summary of the statement of Mr Pieter VAN NUFFEL (observer representative of the Commission of the European Communities) at the first session of the Unidroit study group on the international protection of cultural property.

Study LXX - Doc. 13: Notes on the first session of the Unidroit study group on the international protection of cultural property (submitted by Ms Lyndel V. Prott).

(1) Since this document served as the basis for the group's discussions, the text of the preliminary draft has been reproduced hereafter as APPENDIX III for the sake of convenience.

4. The Chairman briefly recalled the background to the work conducted within Unidroit on the subject of the international protection of cultural property, mentioning in particular the two studies prepared by Ms Gerte Reichelt of the Vienna Institute of Comparative Law at the request of Unesco. He also situated the work of the Unidroit study group on the international protection of cultural property in the context of the existing international instruments, with reference especially to the 1970 Unesco Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property which, although essentially a public law convention, contained an important private law provision, namely Article 7 (b)(ii), and the 1985 European Convention on Offences relating to Cultural Property which was concerned only with criminal law matters. In conclusion he suggested that the group proceed first to a general discussion, after which it could consider, article by article, the preliminary draft Convention on the restitution and return of cultural objects (Study LXX - Doc. 11) prepared by the Unidroit Secretariat after the group's first session.

5. It was so decided.

I. GENERAL CONSIDERATIONS

6. All the members of the group agreed on the need to underline the capital importance of the question of the international protection of cultural property, in particular in those countries with a number of different cultures (tribal and mixed cultures etc.), and this all the more so in the face of the very considerable and alarming increase in the illicit traffic in works of art. It seemed most unlikely that this generalised phenomenon would diminish in view of the fact that works of art increase in value as a result of the influx of money on the market. Indeed, as some members of the group pointed out, "laundered" money is almost double that deriving from legitimate sources given the ever closer links between commerce in works of art and traffic in drugs. One member of the group wondered whether steps were being taken to avoid this increasing traffic in works of art, recalling that a large number of United Nations documents expressed the wish that the countries of origin would permit and indeed encourage legitimate trade in cultural property, but that little was being done politically in this regard. On the contrary some States still imposed a total ban on the export even of objects of no great importance. It was however clear that the greater the difficulties placed in the way of legitimate commerce, the more illicit traffic would increase although, on the other hand, as long as the latter continued, it was politically difficult to encourage the former. It was therefore necessary to accomplish the two aims at the same time.

7. Some members of the group stressed the ineffectiveness until now of purely legal solutions. In the vast majority of those countries especially exposed to the pillage of their cultural property, countries moreover with a long legal tradition and civilisation, and a high standard of living, the percentage of recovery of works of art varied between twenty five and ten percent (in France the police gave a figure of twelve percent) and in most cases the works in question were important and well known.

8. All the members of the group were however in agreement that the new instrument which they were called upon to prepare should as far as possible be uncomplicated, even if this involved certain sacrifices. They considered that progress should be made on a number of matters such as the theft or illicit export of cultural objects and that certain specific situations relating to objects of no pecuniary value should be reserved possibly for special treatment.

II. ARTICLE BY ARTICLE EXAMINATION OF THE PRELIMINARY DRAFT CONVENTION ON THE RESTITUTION AND RETURN OF CULTURAL OBJECTS

Title

9. Although it was decided not to embark on a detailed discussion of the title of the preliminary draft at this session of the study group some members wished to reconsider the words "restitution" and "return". A suggestion was made to the effect that they be replaced by "recovery" in the English version since in Common Law the term restitution refers only to a specific object and if the object is not specified then reference is made to monetary compensation. Furthermore, the connotation given by the group to restitution and return did not correspond to usage in Unesco, for which restitution was limited to property which has, subsequent to 1970, been the subject of illegal commerce, whereas return designated more particularly property removed during the colonial period, removal which was considered legitimate by the former colonial powers but illicit by the former colonies. For these reasons the word "recovery", being more neutral, would avoid a misleading interpretation and would therefore be preferable. It was moreover suggested that if the group were to decide to retain the words "restitution" and "return", then a definition article should be introduced, as was often the case in international instruments, in which case other terms employed in the body of the draft Convention could also be defined.

Article 1

10. This article contains a definition of the term "cultural object" which is based on that to be found in Mr Loewe's preliminary draft and which determines the scope of application of the future Convention.

11. The definition of "cultural object" in *paragraph (1)* of Article 1 gave rise to a number of comments from members of the study group who, without wishing to embark upon a discussion of the terminology employed, expressed a desire to return to the question at a later stage as the term was not entirely satisfactory.

12. Some members experienced difficulty with the language "created by man" the maintenance of which was seen as unduly restricting the definition and accordingly they requested its deletion. Stress was also laid on the need to ensure consistency with the 1970 Unesco Convention which includes in its definition of cultural property "rare collections and specimens of fauna, flora, minerals ..." and the group therefore decided to delete the language in question.

13. Always with the desire in mind to secure compatibility of the text with the 1970 Convention, the group was of the view that it was not possible to take over the definition from that Convention as the two texts had different aims. A list of the kind contained in the 1970 Convention posed too many problems whereas the concern of the group was to ensure simplicity.

14. Finally, it was suggested that a future drafting committee might wish to insert the words "and in particular" after the adjective "cultural" since the wording of the provision could give the impression that what was artistic, historical, spiritual or ritual was not cultural.

15. The group then passed on to *paragraph (2)* of Article 1. As regards *sub-paragraph (a)* it approved the substance of the provision as it was deemed necessary, after the restitution or return of the object, to avoid the possibility of the person in possession seeking once again to assert his rights, although some members of the group believed it desirable to modify its structure. A suggestion was also made to refer in the first sentence only to ownership or security so as to avoid the expression "other rights" which could give rise to problems of interpretation but this was considered to be insufficient. However, to take account of these two remarks it was proposed to include in the provision the words "subject to the following articles" or "without prejudice to the following articles".

16. It was moreover pointed out that the expression "a person who has been deprived of possession" covered any natural or legal person whether private or public and therefore a State when it had been dispossessed. The first part of the sentence established a link with Article 2 when a person had been involuntarily deprived of possession whereas the second part contemplated the case of the infringement of an export prohibition. Under the proposed system there could be cases in which the possessor would receive compensation and would therefore be unable to assert his rights over the object. In the event however of his not being compensated (Articles 4 and 5) the first part of the provision ought to be deleted. Some members expressed doubts as to those cases where a State provided in its legislation that an illegally exported object would automatically become the property of the State since the case of illegal export could overlap with that of a dispossessed owner; there was therefore an area of possible confusion with illegal export where it could be imagined that there was a possessor, whether a private person or a public entity, but which was not necessarily the State, and the case of an owner which might be a State or a private person and which had been deprived of possession. By way of example, it was recalled that under a new Spanish law any property illegally exported becomes the property of the State, but this was for procedural reasons so as to permit the State to recover it, after which

it would decide according to its own law whether to return the object to the legitimate owner. Other members were however of the opinion that such a law would certainly not be recognized by any other State.

17. The members of the study group were divided as regards *sub-paragraph (b)* which referred to intermediaries. It was suggested that this was not a matter to be dealt with in the Convention for since a person obliged to return an object would normally seek redress from such an intermediary, the matter would be decided by the applicable national law. This did not signify that such persons would be free from liability but as recourse would generally be had against an expert in the country where the purchase had been made (all events taking place in the same country), national law would apply. Some members wished to see the deletion of this provision which they considered to be superfluous from a legal point of view, whereas others preferred to retain it for reasons associated with the political acceptability of the text.

18. Before the group passed on to its consideration of Article 2, it was recalled that as Article 1 (2) was at present drafted, it covered cases dealt with by Article 7 (b)(ii) of the 1970 Convention. With a view therefore to avoiding a clash between the two provisions, it would be necessary to bear in mind the spirit of the content of the latter provision when deciding upon that of Article 2.

Article 2

19. This article establishes the principle of the restitution of a cultural object to a person dispossessed by theft or by another act assimilated thereto and is to a large extent based on Mr Loewe's preliminary draft.

20. Differing opinions were expressed on *paragraph (1)* as to whether reference should be made only to theft or a broader reference made to "any other culpable act assimilated thereto". In effect, at the first session of the study group, some members had been opposed to this extension on the ground that such acts could not be assimilated to theft. Other members had however argued in favour of the widest possible coverage precisely on account of the substantial differences in internal law as regards the possibility of claiming restitution of movable property, in which connection the commerce in works of art gave rise to particular concern.

21. Other members recalled the existence in Common Law of a very important distinction as regards the effects of certain acts. In the case of fraud or criminal acts a good faith purchaser could, unlike stolen

property, acquire title and if the present wording were to be maintained a person in a Common Law jurisdiction would find himself in a better position than one in a similar situation in a Civil Law country. It was however replied that the group had no need to concern itself with such different consequences nor with the fact that such a rule on restitution of cultural property could sometimes upset the traditional rules of private law regarding the transfer of ownership.

22. As regards the drafting, the group called for the deletion of the word "culpable", preferring to speak of a "criminal act" or of an act "sanctioned by the criminal law". Some members proposed the deletion of the list of means of appropriation and to refer rather to "theft or any other similar act sanctioned by the criminal law" while others argued for the retention of the existing text and the deletion only of the word "culpable". Yet others wished to reconsider the words "assimilated thereto" for the reason that from the standpoint of the dispossessed person, the manner in which he had been dispossessed, whether by theft, fraud or conversion, was of no importance even though from the angle of criminal or administrative law, or of restitution, those acts could not be considered as equivalent.

23. At the first session of the study group, opinions had differed as to the choice of law rule in paragraph (1). Indeed, if this paragraph were to be read in conjunction with Article 9, the characterisation of the culpable act would have to be determined, at the option of the claimant, by the courts either of the State where the possessor of the cultural object had his habitual residence or of the State where the cultural object was located with the consequence that the problem of definition would be avoided. A contrary opinion had however been expressed in the sense that those questions of definition should be governed by the law of the State on whose territory the culpable act had been committed and it was for this reason that the two solutions had been placed between square brackets in the text. On this occasion there was a consensus within the group to opt for the law of the State of the court seized of the case on account of a reluctance to rely on foreign criminal law and because no State would be prepared to condemn a person who would not be judged guilty under its own law.

24. The group then considered the fundamental question of whether or not, in the case of theft, the possessor would always be required to return the object and whether therefore the paragraphs included in the text in square brackets should be maintained. The language in square brackets contained a rule on the burden of proof in a negative formulation which some members of the group were reluctant to include in an international convention, whereas others preferred to rely on rules relating to the

behaviour of the possessor rather than on rules of proof to determine whether or not the object should be returned. Others however were of the opinion that from the technical standpoint it was not possible to dispense with rules concerning proof with a view to establishing rules as to the behaviour of the possessor.

25. Mr Loewe explained the original intention of the provision and the reasons for his choice: the 1974 draft Convention providing a Uniform Law on the Acquisition in Good Faith of Corporeal Movable (hereafter referred to as "LUAB") had not been successful because one half of the States admitted the possibility for a *bona fide* purchaser to acquire title to a stolen object while the other half had adopted a rule to the contrary. He had therefore invented an intermediate solution by devising a *bona fides* of the possessor which it would be extremely difficult to prove but if the latter could succeed in adducing that proof he would be entitled to retain the object. If on the contrary a rule were to be laid down to the effect that there would always be restitution in the case of theft (with or without compensation) then the chances for the future Convention to be accepted would be seriously compromised.

26. Most members of the group seemed willing to accept the idea of adopting a flexible solution, namely no automatic restitution in the case of theft, although a contrary opinion was expressed to the effect that there should be restitution in all cases, the rules of proof coming into play only in regard to compensation (if the possessor proved what was required of him then he would be entitled to compensation). In support of this view it was pointed out that such a rule was to be found in the 1970 Convention and that not to follow it would weaken the protection granted. The group considered that, in a spirit of compromise, one could envisage the adoption of a rule providing for restitution in all cases, limiting it however, as did the 1970 Convention, to objects exhibited in museums.

27. The study group having thus reached a consensus that there should be no automatic restitution in the event of theft, it then considered *sub-paragraph (a)* of Article 2 (1) which took over the text of paragraphs (2) and (3) of Article 7 of LUAB. The first point raised related to the expression "precautions normally taken" which was criticized by some members of the group. In the opinion of one of them the language conveyed the idea of the practices normally followed when what was called for was a special attempt to be made in connection with the object which had been acquired. To avoid this expression a suggestion was made to speak of the taking of precautions required in the acquisition of such an object or of the "necessary vigilance".

28. For the sake of simplicity, another member proposed referring only to a purchaser who "has taken all the necessary precautions" without further explanation which in his opinion would only confuse the understanding and interpretation of sub-paragraph (a). The other members however believed that the sub-paragraph served an educational purpose and that to simplify it would reduce the protection accorded to the victim of a criminal act.

29. The provision, as already mentioned, took over paragraphs (2) and (3) of Article 7 of LUAB, without however referring to the quality of the purchaser. The question thus arose of whether, given the specific character of the provision, that factor ought also to be included. Two members of the group were opposed to such an addition since on the one hand it could lessen the protection and on the other it would suggest that there were different levels of purchasers; moreover it would be too dangerous to have regard to the situation of the "innocent amateur". Other members of the group were on the contrary of the belief that it was necessary to have regard to the qualities of the two parties as objective aspects of the circumstances of the contract so that it would be desirable to include a reference to the quality of the purchaser. They noted moreover that in any event the case law tended to take account of the qualities of both parties, and that would be so whether or not this was mentioned in the text.

30. The group then proceeded to consideration of *sub-paragraph (b)* of paragraph (1) which had not featured in the previous text of the draft but which had been introduced by the Secretariat so as to express an idea suggested by one member of the group at the first session, namely the compilation of a register of stolen cultural property and the imposing of an obligation on any purchaser to consult it. This was an additional precaution to be taken but it was not intended to signify that for the purchaser to be protected the object must be entered in a register.

31. Although a majority of the group favoured the inclusion of such a provision which they saw as being useful, and even necessary, some members expressed concern and doubts regarding the existence and accessibility of such registers. The attention of the group was drawn to the ineffectiveness of the registers of stolen property currently in existence and this notwithstanding the important initiatives undertaken for example by Interpol, Lloyds and the International Foundation for Art Research. It was indeed recalled that Interpol registered each year only 1% of stolen works of art as its register was, for the purposes of efficiency, highly selective. This selection was necessary for there were approximately 80,000 works of art stolen each year both in France and in Italy, which also signified that no country was at present able to maintain a fully updated list.

32. The problem of clandestine excavations was also raised in this connection since objects coming from such excavations obviously did not appear in any register and those acquiring them used this argument to prove their good faith (for example the statue of Artemis in the Getty Museum).

33. As to the question of the accessibility of a register of stolen objects the group was of the belief that while this was a problem today, the development of telecommunications in years to come would alleviate the difficulties.

34. It was likewise recalled in this connection that it was important to maintain the nature or the quality of the purchaser in sub-paragraph (a) of paragraph (1) for one could expect an antique dealer, for example, to consult a register.

35. Finally, a number of drafting suggestions were made, the first of which was to add the words "accessible" after "register". The second was to replace the words "which the possessor could reasonably have been expected to have consulted" by "which the purchaser could reasonably have consulted". The last amendment proposed was to add the words, "and, moreover" between sub-paragraphs (a) and (b) so as to make it clear that the purchaser must, to secure protection, have taken the precautions referred to in sub-paragraph (a) and in addition have consulted the register mentioned in sub-paragraph (b).

36. As regards *paragraph (2)*, one member suggested that it was necessary to make it clear that what was contemplated was not an intermediary so as to avoid any risk of misunderstanding.

37. The group was of the opinion that it was not possible to discuss *paragraph (3)* of Article 2 without having first considered Article 3, given the very close link between the two provisions.

Article 3

38. The Secretary-General explained the relationship in the draft between Articles 2 and 3. If the purchaser had taken all the necessary precautions laid down in Article 2 there would be no question either of restitution or of reimbursement; if on the contrary the purchaser had failed to take those precautions (Article 2 (1)(a) and (b)), he would be obliged to return the object. Article 3 then provided that in the event of restitution, there would be reimbursement (paragraph (1)) unless the dispossessed person could prove that the possessor had acquired the object with knowledge that a criminal act had been committed or in circumstances

in which a purchaser should at least have had doubts in that regard (paragraph (2)). The difficulty encountered by the Secretariat in drafting the text had lain in the fact that if the intention had been to recognize a general duty of restitution (and therefore not to retain the language in square brackets in Article 2), that language could have been transposed to Article 3 in which case the precautions would be relevant for the question of compensation. If on the other hand the language were to remain in Article 2, the question would have arisen of whether the text of Article 3 should be retained but with a different rule as to the burden of proof. In consequence the content of Article 3 would depend very much on the decision taken in regard to Article 2.

39. The group agreed that it was necessary to consider three different situations and not two when deciding upon the text, for what was being asked of the purchaser in terms of precautions was not merely good faith but extreme vigilance. The first situation to be contemplated was that where the possessor could demonstrate his good faith in the severest sense, in which case he could keep the object. The second was that where although in good faith he failed to meet that test, in which case he would be obliged to return the object against compensation, which remained to be determined, while the third was that where the purchaser was in bad faith or where serious doubts existed as to his good faith and then he would have to return the object without any entitlement to compensation. One member suggested that in the event of restitution provision should in all cases be made for compensation, whether in part or in whole, but he was not followed by the other members of the group. The adoption of the system underlying the previous draft had been made easier by the different categories of value contemplated but, since they had been deleted in the new version, the same vigilance was required whatever the value of the object.

40. Before passing on to Article 3, it was decided that the working hypothesis should be that if the possessor had taken all the precautions required under Article 2, he should not be required to return the object.

41. The amount of the compensation referred to in *paragraph (1)* of Article 3 is limited either to the price paid or to a sum corresponding to the actual value of the object so as to avoid the possessor speculating on its value. However, some members of the group proposed going further in a spirit of compromise by providing that the judge should award an equitable sum which should exceed neither the price paid nor the actual value. This proposal was made to take account of the concern of certain members of the group regarding the financial possibilities of the dispossessed person who might not be able to "repurchase" the object. This solution, which would furthermore transform the compensation originally envisaged into a maximum, would allow the judge to take into consideration not only the possibility

for the dispossessed person to repurchase the object as well as any insurance which he might have taken out.

42. Some members believed that it would be more appropriate to speak of "equitable compensation" awarded by the judge without laying down any limit, as this was a term often used in international instruments and such compensation would be rather restricted (as it would never be the full value). Although aware of the fact that such a provision could work both ways, they did not wish to lay down any more precise criteria and preferred to leave it to the judge to determine the amount of compensation.

43. Other members however were opposed to leaving such a wide margin of discretion to the judge by employing such imprecise language as "equitable compensation". They were satisfied with the present wording since the notions of purchase price and actual value were well known and did not pose difficulties in practice. A proposal was also made in connection with the price paid to add a reference to interest in cases where the purchaser had not been negligent while finally another member stated that he was opposed to a system which made provision exclusively for judicial settlement of disputes as the parties might wish to settle them directly.

44. Another concern which was expressed related to the economic position of developing countries which would be unable to secure restitution of objects on account of their inability to pay the compensation. To meet this concern, one member proposed speaking of an equitable value which would be that of the object in the country where it had been stolen and he called for the creation of a special fund to assist developing countries. Another proposal made in this connection envisaged a dual regime, namely reimbursement of the purchase price for objects stolen in a developed country and the payment of equitable compensation for those stolen in a developing country. While recognizing that this was a legitimate and understandable concern, the other members of the group saw such a double regime as having both political and economic drawbacks and were of the opinion that the idea of equitable compensation to be awarded by the judge already allowed account to be taken of the limited financial capacity of developing countries. In a spirit of compromise it was proposed employing the language "equitable compensation having regard to the situation of the two parties".

45. As to a proposal to replace the value of the object at its place of location by that at its place of origin, some members of the group believed that such a precise reference could also work in two directions and that it would not necessarily be favourable to the dispossessed person. Furthermore, since the question would be settled in the country where the object was located, the procedure would be complicated as it would be

somewhat delicate to ask a judge in that country to conduct an enquiry into its value in another, perhaps distant, country, which value it would often be difficult to ascertain. However, since what was at issue was equitable compensation, and with a view to meeting that concern, it was proposed to delete the words "at the place where it is located" at the end of paragraph (1) and to speak only of the "actual commercial value of the object". In this way the judge would be able to apply the value of the object at the place which seemed to him to be the most appropriate.

46. *Paragraph (2)* of Article 3 provided that if the dispossessed person proved that a possessor who had acquired the object with knowledge that it had been stolen or in circumstances in which a reasonable purchaser should at least have had doubts in that regard, then such person would not be obliged to reimburse the possessor. The group considered the question of the burden of proof, paragraph (2) placing it on the dispossessed person whereas Article 2 (1) provided that, so as not to be obliged to return the object, the possessor must prove that he had taken all the necessary precautions. The group wondered whether the burden of proof ought not to rest on the same person in both provisions. One member was of the opinion that it would be preferable to place the burden of proof on the possessor rather than on the dispossessed person. Moreover, more assistance would be forthcoming from the insurance companies if the burden of proof were to rest on the person alleging his good faith.

47. The structure of Article 3 was criticized on the ground that paragraph (1) contained the idea that the person who had been negligent was entitled to compensation whereas paragraph (2) provided that if he had been grossly negligent then he would not be reimbursed. So as to avoid this it was suggested that the article be redrafted as a single paragraph which would provide that if the negligence justifying restitution had not been such as to permit the deduction that the purchaser did have knowledge of the culpable act, then the judge could award equitable compensation.

48. Mr Loewe proposed a new draft of Article 3 in the form of a single paragraph which would take account of the concern expressed and the suggestions made in the course of the group's discussion (see APPENDIX IV to this report). The group however deferred consideration of the new wording until its next session, all the more so as it wished to discuss the relationship between Articles 2 and 3 on the basis of a document which would indicate side by side the different possible versions proposed (see APPENDIX V to this report) and which would permit it to take a number of decisions.

Article 4

49. This article deals more specifically with the return of a cultural object exported in defiance of a prohibition whereas the preceding articles were concerned with theft and other criminal acts. Whereas there was, as regards stolen objects (Article 2), no clear majority permitting a choice to be made between one solution and another on the question of the good faith purchaser, hence the square brackets, there was, in relation to illicit export, a strong majority of the view that neither good faith nor the taking of precautions should be an obstacle to return on condition that the time limits mentioned in paragraph (2)(b) were respected.

50. The language in square brackets in *paragraph (1)* concerning the State which may call for the return of an illegally exported cultural object was already the subject of criticism at the first session of the group and the decision whether or not to retain it will determine the fate of paragraph (2)(c) of the same article. The group believed that while importance should be attached to the State where the object had been created, it was often very difficult to identify that State and that for this reason it would be preferable to delete any reference to it from the draft and rather to protect the State whose export prohibition had been infringed. No opposition having been expressed within the group, it was decided to delete the words "in which it was created".

51. Some members of the group were concerned by the fact that the article provided that a foreign State could expropriate property belonging to private individuals on the ground that the property had been exported from the requesting State in defiance of its export control rules. They were of the opinion that such a reading of the text would be an obstacle to the acceptability of the future Convention. Others did not interpret the provision in such a radical manner, believing that this was not in principle a case of "return" since although a possessor who had not been negligent would have to return the object to the country from which it had been illegally exported, he could then dispose of it as he wished. It was only if he had been negligent that it would be expropriated. In their view the only novelty of the provision was that it would require the taking into consideration of foreign public law protecting cultural objects. However the fear expressed by some members, for example in relation to countries where the simple infringement of an export prohibition would entail forfeiture to the State, should not be underestimated.

52. The problem of proving the infringement of the export ban was raised in the course of the discussion since paragraph (1) was silent in that respect. The original idea had not been to introduce a rule of proof since it would be extremely difficult for a State to prove that the ban had

been infringed by an act of which it was not aware. It would therefore be for the judge to decide whether or not there had been such infringement. One member of the group was however of a different opinion, believing that it was easier to prove an illegal export than theft, as it would be sufficient for the State to produce its legislation relating to export control whereas, to prove a theft, the dispossessed person would have to identify precisely the object which was often very difficult.

53. The group believed that it would be necessary to mention the problem of clandestine excavation for in many countries objects which came from such excavations were considered as belonging to the public domain. This then raised the question for example of the time from which an object became public property (before or after the act of recognition by a public authority?).

54. The group also considered the link between illegal export and theft and the possible coincidence of the two. Several members indeed stressed that there were three possible situations to be taken into account, that of a stolen object legally exported, that of a stolen object illegally exported and finally that of an object which had not been stolen but which had been illegally exported. The group was of the belief that a solution should be found for each of these situations after the problems of theft and illegal export had been dealt with separately.

55. Finally, as regards this provision, the group accepted the proposals of certain members to amend the existing language. It was decided in the first line of paragraph (1) to replace the words "notwithstanding a prohibition" by "in violation of a prohibition". In the third line the group decided to add the words "or another competent authority" after the word "court" so as to leave the possibility to administrative authorities to deal with the problem in those countries where this was allowed.

56. The group then proceeded to a consideration of sub-paragraphs (a) and (b) of paragraph (1) which laid down the conditions attached to the return of cultural objects. *Sub-paragraph (a)* found its origins in Mr Loewe's draft where it was the only condition but, combined with other conditions as had been the wish expressed by several members of the group at the first session, it would lose much of its importance. Some members of the group favoured the retention of the provision as it would simplify the task of the requesting State which would not be required to prove the significant impairment to its interests mentioned in sub-paragraph (b) and because the word "or" at the end of sub-paragraph (a) would allow a choice between a pecuniary value and the other criteria. Some other members of the group were however concerned with the possible abuse of the pecuniary value and called for the deletion of the sub-paragraph or at least the

replacement of the word "or" by "and" so as to avoid an object being returned without any of the conditions in sub-paragraph (b) having been satisfied simply because it was of high value.

57. Since the group was unable to agree on the wording of this provision, it was decided to retain it for the time being in square brackets.

58. The alternative solution to the criteria of pecuniary value was contained in *sub-paragraph (b)* of paragraph (1) in the form of a list of interests which the illegal export must significantly impair for the object to have to be "returned". With a view to simplicity, it was proposed to delete the list and to speak only of "impairment of fundamental cultural interests", leaving it to the judge to determine what those interests might be. The majority of the group however preferred a greater degree of precision and it was agreed to retain the first four points set out in sub-paragraph (b), *(i)*, *(ii)*, *(iii)* and *(iv)* namely the physical preservation of the object or of its context, the integrity of a complex object and the preservation of information of importance to humanity as a whole and not simply to the requesting State while the last criterion, the use of the object by a living culture, was intended to recognize and honour a living culture, wherever situated.

59. The text of *point (v)* of sub-paragraph (b) caused more difficulty to the members of the group. After expressing the view that the existing wording was too vague (what was a "great importance" and how was it to be measured?) and left the judge too wide a measure of appreciation, Mr Crewdson suggested a redraft indicating the elements of discretion and the importance of the object (see APPENDIX VI). Several members supported the new language but criticized the words "great importance" which they preferred to see replaced by "exceptional" or "outstanding" importance, while others favoured the retention of the preceding version or even the deletion of the provision. As no consensus could be reached on this point, the group decided to retain the original text and to add the new proposal in square brackets.

60. The last interest mentioned in *point (vi)* of paragraph (1)(b) related to those cases where an arrangement had been concluded between the requesting State and the former possessor of the object under which the latter had agreed against certain advantages to make the object accessible to the public. The special treatment reserved to such arrangements had been criticized at the first session of the group on the ground that it introduced a distinction between cultural objects held by private or public persons, which could create an element of confusion. Several members of the group found the provision to be illogical as it related to an interest

which did not concern the group and which had no place in the draft Convention since it could cover objects of no great cultural importance. To meet the objection that the provision in question contained an anomaly in the sense that it excluded objects placed in museums, it was proposed simply to speak of "collections accessible to the public". For these reasons they believed that the provision should be deleted although others favoured its retention as it would facilitate the task of the requesting State and since such arrangements would only be concluded in regard to objects of great cultural importance.

61. So as to take account of all the concerns expressed, it was suggested that point (vi) be transferred to paragraph (3) of Article 4. In this way the State could no longer rely on the protection of all cultural property but only that of a certain importance. The requesting State could thus invoke the existence of such an arrangement in the framework of paragraph (3) (information which it could provide). Another suggestion was to introduce in point (v) the idea at present contained in point (vi) by language along the following lines "... established for example by classification or similar measures, or by taxation arrangements with private persons whose collections are accessible to the public". The majority of the group however favoured the deletion of the provision or a new form of wording which would be introduced elsewhere in the text.

62. The group then passed on to *paragraph (2)* of Article 4 which contained three exceptions to the principle of return to the requesting State of illegally exported objects.

63. The group as a whole favoured the introduction in *sub-paragraph (a)* of paragraph (2) of the idea of the ineffectiveness abroad of prohibitions concerning the export of objects during the lifetime of the person who had created them or during a certain period after his death although the proposed period of fifty years based on copyright law was not acceptable to all. Some members of the group believed the period of fifty years to be too long and suggested following the example of certain legislations which made provision for a period of twenty years after the death of the artist, while others preferred to retain the fifty year period or even a longer one. Given this division of opinion the group decided to place the two alternatives of twenty and fifty years in square brackets.

64. The relative and absolute limitation periods contained in *sub-paragraph (b)* of paragraph (2) concerning the request for return gave rise to hesitations on the part of some members of the group. They pointed out that the starting point for the shorter period was very difficult for the requesting State to prove ("knew or ought reasonably to have had knowledge"), and that the absolute period was too short, as it is common,

in the case of investments, for an object to appear on the market twenty years after the date of export. Under the provision as it stood it would be impossible for the requesting State to obtain the return. The group decided to retain sub-paragraph (b) and to delete the square brackets, while taking note of the objections of two members of the group.

65. The fate of *sub-paragraph (c)* of paragraph (2) depended on the decision of the group concerning the retention or deletion of the words in square brackets "in which it was created" in the introductory language of paragraph (1). In the light of the decision to delete these words the majority of members considered that sub-paragraph (c) should be deleted since a State which believed a cultural object to be of the utmost importance to it could never be obliged to return it to another State. The group however noted that if this idea were to be omitted, this would increase the importance of Article 6 which dealt with public policy (*ordre public*). The opinion was however expressed that if the idea were to be retained then it should be limited to paragraph (1) (b)(v), in which case a new drafting would be necessary. Preferring however not to lay down a positive rule of law on this matter, the group decided to delete the provision.

66. *Paragraph (3)* of Article 4 had been included in the draft to take account of the concern of some members of the group that the circumstances in which the State addressed could refuse to accede to the request for the return of the object or to attach non-pecuniary conditions to such return should be specified.

67. Some members considered this provision, as presently drafted, to be pointless as there was a close connection with Article 4 (1) (a) and (b). If the request were made under sub-paragraph (a), it would be sufficient for the object to have a value of X for the judge not to need to take account of the present and future situation of the object. If on the other hand the request were founded on sub-paragraph (b) on the basis of the interest which was impaired then the circumstances of the case would become relevant with the possible exception of point (v). It was suggested that the requirement that the object must be kept in an appropriate place had not been accepted in substance.

68. Other members believed it to be important, for the credibility of requesting States, to lay down non-pecuniary conditions for the return of illegally exported cultural objects and to this end it was necessary to reinforce the normative character of the provision. The intention was, at one and the same time, to protect the object and to make the request more credible and not to create obstacles to the return. Mr Fraoua and Mr Lalive proposed a new form of wording for the paragraph which made provision for

certain information to be required for the request for return to be admissible (see APPENDIX VII). This text will be examined in detail by the group at its next session.

Article 5

69. The general structure of Article 5 has in effect transposed the solution proposed in the Loewe draft for the "bad faith" purchaser to that of the good faith purchaser in the sense that he neither knew nor ought to have known that an export prohibition had been infringed. This article was therefore essential to the draft Convention in that it drew a distinction between the possessor in bad faith who must return the object to the requesting State (paragraph (1)) and the possessor in good faith who must either return it subject to receiving compensation or transfer it to a person of his choice in the requesting State (paragraph (2)).

70. The language "should at least have had doubts in that regard" contained in paragraphs (1) and (2) was criticized by the group since in comparative law the word "doubt" has always been qualified by an adjective such as "reasonable" or "serious". So as to avoid the word "doubt" it was proposed substituting the former language with the words "knew or ought to have known", a suggestion unanimously accepted by the group.

71. The question of whether, in *paragraph (1)*, it should be for the possessor or the requesting State to prove that the former knew of the illegal export was left open at the first session of the group as differing opinions had been expressed. One member believed that the burden of proof should be placed on the possessor and not on the requesting State as was provided for in the text as drafted. Some other members of the group on the other hand believed that the proof should be adduced by the requesting State on the ground that a convention which indirectly imposed an obligation on all persons to know the export laws of other countries had no chance of success. Furthermore, one of the difficulties facing a reasonable person was to know the provenance of the object and, if he was not aware of it, it would be impossible for him to know where to search to establish whether any export rules had been infringed. It was however pointed out that the reversal of the burden of proof would require every purchaser to be in possession of an export certificate duly issued by the exporting country, although the present law was still far from that desirable solution.

72. In this connection some members of the group saw a problem of construction in Article 5 since, by virtue of Article 4, the requesting State had proved that the object was one which met the necessary

requirements, so that it had in any case to be returned. The proof called for in paragraph (1) of Article 5 no longer had any sense since it had already been brought under Article 4. Having thus laid down the principle of return in Article 4, it was proposed deleting the words "shall be required to return the object to the requesting State" so that the paragraph would be concerned only with the question of reimbursement, or even, so as to avoid any ambiguity, to delete paragraph (1) of Article 5 entirely, a proposal which was ultimately adopted.

73. The group then considered *paragraph (2)* of Article 5 which had become a single paragraph. Some members thought that even if no final decision had been taken regarding Article 2, the infringement of an export prohibition could not be sanctioned more severely or in the same manner as a criminal act committed to obtain possession of the object. However the existing text was such that its implications would be even harsher than those of Article 2 as there was no form of good faith, even the most scrupulous, which would allow the possessor to retain the object, although he could keep a stolen object. The group decided therefore to introduce a possibility for the possessor in perfect good faith to return the object to the State from which it had been exported but to remain its owner and to retain possession.

74. This paragraph also raised a problem of proof in the sense that as the text was drafted it was for the possessor to prove his good faith. Although some members expressed support for the text while nevertheless being of the opinion that it was necessary to spell out the precautions to be taken as had been the case with Article 2 (1), others were of the view that it was not possible to require someone to prove a negative (no one can prove what he never knew), and since the foreign State was calling for the return, it should be for that State to prove that the possessor knew or ought to have known that an export prohibition had been infringed, so that the reversal of the burden of proof could only be contemplated if all possessors were professionals. The proposal to spell out the precautions to be taken by the possessor was for its part generally supported.

75. It was also pointed out that if Article 2 (2) were to be retained then it would be necessary in Article 5 to introduce the language "or his predecessor under Article 2 (2)" at the beginning of the provision after the words "[t]he possessor", although one could not attribute to the possessor the absence of good faith of the person from whom he had acquired the object for value.

76. In connection with the converse situation the group considered the question of the protection of a good faith purchaser who had transferred the object to a person who knew that it had been illegally exported from

the country of origin, for example following a press campaign. One member maintained that with a view to protecting the good faith purchaser he should be allowed to transfer the object for value to someone who might know that it had been illegally exported for if this were not the case then he would be deprived of the protection accorded to him, since its market value would be diminished and he would no longer be able to sell it at its full value. He was therefore of the opinion that in order to protect the purchaser in good faith it might be necessary also to protect a person who bought the object from him, whether or not that person was in good faith. The majority of the group did not however see any problem in this respect, considering that the purchaser was sufficiently protected in this situation, although it argued that in the light of the discussion it would be necessary to distinguish between cases where the person who acquired an object from the first purchaser in good faith knew, at the moment of the acquisition, that the object had been illegally exported, from those in which he learned, after taking possession of it, that it had been illegally exported.

77. Without wishing to embark on a detailed discussion of the question, the group noted that the reference to "a sum corresponding to the amount which would be due by a dispossessed person in conformity with Article 3 (1)" raised a problem as the content of that paragraph had been changed, given that the calculation of the compensation in Article 3 had itself been modified: what was at issue was no longer the real value of the object, but rather an equitable sum accorded by the judge within certain limits. It was argued that while such a solution could be envisaged in the case of, for example, theft, one could not impose such a calculation based on equity on a possessor in good faith of an object which had previously been illegally exported and who should therefore receive full compensation.

78. The group then proceeded to consideration of the last sentence of paragraph (2) which had been placed in square brackets following a long discussion at the first session concerning the undertaking required of the requesting State neither to confiscate the property nor to interfere in any other way with possession.

79. This undertaking created difficulties for some members of the group as the person chosen by the possessor in the requesting State might be the person who had illegally exported the object and again because, to be able to assume the undertaking, those countries which had already taken special measures in their law to cover such cases would have to alter them. A proposal was made to delete this last sentence of paragraph (2) which accorded too great a protection to the object and to make provision rather for conditions governing the return (conservation measures etc.). While believing that these considerations were relevant a majority of the members

of the group was nevertheless of the opinion that the idea expressed in the language in square brackets should be retained, even if the wording needed to be changed, as otherwise the person under an obligation to return the object would always choose to be compensated for if the requesting State were unable to pay the compensation there would be no return.

80. Two proposals were made to improve the drafting and thereby to facilitate the acceptance of the provision by the greatest number of States. The first was to impose a temporal limitation so as to encourage the possessor to return the object and a period of thirty years was suggested. The second was to indicate the person who would receive the object (not to specify any person at the choice of the possessor), for if the possessor were to choose a person in the requesting State then the latter would have to furnish guarantees as to its conservation, security and accessibility. This proposal was consistent with the content of Article 4 (3).

81. The group decided for the time being to leave the phrase between square brackets and accepted the proposal of one of its members to prepare for the next session a paper containing a more radical solution which would contemplate not the transfer of ownership but the return of the illegally exported cultural object in all cases if the requesting State were able to discharge the difficult burden of proof established by Article 4. The only distinction which he proposed drawing between the bad faith and the good faith purchaser was that the former should meet all the costs of the proceedings associated with the return, its physical return and its safeguarding in the requesting State, although he would nevertheless be permitted to retain ownership.

Article 6

82. This article had been introduced into the body of the draft Convention although no decision to that effect had been taken at the first session of the study group, on which occasion it had simply been noted that exceptional situations could be imagined, for example an export prohibition relating to the works of a particular ethnic group within the requesting State, in which the courts of the State addressed would find it offensive for reasons of public policy (*ordre public*) to recognize the prohibition in any way. The proposed text was based on Article 5 of the Hague Convention on Celebration and Recognition of the Validity of Marriages of 14 March 1978.

83. The majority of the members of the group considered the provision to be unnecessary and moreover somewhat curious for if the purpose of *ordre*

public was not to apply a foreign law on the ground that it ran counter to fundamental concepts or not to recognize foreign decisions, what was here in question was a uniform law which, once adopted, would become the law of a country and not a foreign law. Other members of the group called for the deletion of the article on the ground that it involved a subjective element or that it was dangerous as in the Common Law judicial discretion was very broad. Another formula was proposed according to which there would be no return if the object had a higher value in one country than in the other.

84. While there was agreement within the group to delete Article 6 of the draft, some members of the group nevertheless believed that in the interests of the acceptability of the Convention it would be necessary to conserve the idea contained in Article 4 (2)(c) (now deleted). It was therefore decided that the group should at its next session attempt to introduce the content of this article in another provision so as to identify certain well defined cases which would be excluded from the principle of return as contemplated by the Convention.

Article 7

85. The group decided not to proceed at this stage to a discussion of *Article 7*, dealing with the unit of account to be applied, given that any indication of value had been definitively deleted from the text of the draft Convention, with the exception of Article 4 (1)(a) where the question remained open (this sub-paragraph having been placed in square brackets on account of the differing opinions expressed in regard to it). Indeed the discussion would only have any sense if the reference to the value of the object were to be retained in Article 4.

Article 8

86. The issue dealt with in this article was that of providing financial compensation to a purchaser in good faith who was nevertheless required to return the object, the question no longer being that of the amount of the compensation but the criterion for determining it. One member of the group noted that if *paragraph (1)* of the article were to be retained, it would be necessary to indicate that there were different methods of calculating the value of a cultural object (purchase price and possibly accrued interest) and not just the one contemplated by the present text of the provision. So as to take account of this objection it was decided to add the words "in particular" in the text before the words "be had" in the second line.

87. Certain members argued in favour of the deletion of the word "price" in the provision and for its replacement by the term "value" which would allow regard to be had to a value other than the pecuniary value of the object so as to cover objects whose value could not be quantified. It was however replied that if the proposal were accepted then the article would lose its meaning as the competent authority would have total discretion to determine the value.

88. The fact of speaking of the price applied "at the place where the object is located" caused difficulties to some members of the group, one of whom requested that reference be made rather to the value in the country calling for the return and not in the country where the object was located.

89. Finally, the same objection was raised as had been at the first session with regard to the language in square brackets, namely that a reference to auction sales would be offensive to the community to which the object belonged and that it ought therefore to be deleted.

90. As regards *paragraph (2)* of Article 8, the group argued that its scope should be narrowed. In effect, the purpose of the provision was to increase by way of a fiction the value of an object belonging to a collection in relation to Article 2 where the notion of pecuniary value had been eliminated and to Article 4 where the reference had been placed in square brackets. The group was of the view that it would be meaningless to retain the paragraph if a decision were taken to delete Article 4 (1)(a) and it was accordingly agreed for the time being to place the whole of the article in square brackets.

Article 9

91. This article, which specifies what are, at the option of the claimant, the courts with jurisdiction over claims governed by the draft Convention, received a favourable reception from the members of the study group.

92. The first possibility offered to the claimant was to bring proceedings before the courts of the State where the possessor has his habitual residence. Many conventions refer to domicile rather than to residence but in this instance the choice of the place of residence was judged to be preferable as a cultural object has no fixed location and in most cases residence would be added to the classic grounds of jurisdiction.

93. The second possible ground of jurisdiction was that of the courts of the State where the object is located. The group as a whole was fully

satisfied with this rule, one member noting that jurisdiction was accorded to the court where movable property is located in respect of actions for its recovery or actions otherwise related to such property, neither in the Brussels Convention of 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters nor in the Lugano Convention of 1988 which bears the same title (worked out by eighteen States) both of which prohibit such a ground of jurisdiction. It was therefore necessary for the specific case of cultural property to accord jurisdiction to the courts of the place where the object is located so that an object in a Contracting State could be returned even if the possessor had his domicile or habitual residence elsewhere.

94. The article also contemplated the possibility for the parties to agree upon another jurisdiction. Some members of the group considered the choice of forum to be an essential procedural freedom for the parties and that the omission of such a provision would create an obstacle for certain States to ratify the Convention. The choice of forum was largely recognized in private international law and did not cause problems of enforcement even if recourse was rarely had to it.

95. Finally, the parties could agree to submit their dispute to arbitration. In this connection the group was unanimous in recognizing that arbitration permits the respect of confidentiality and it was to be expected that the 1985 UNCITRAL Model Law on International Commercial Arbitration would be widely accepted also by developing countries. Moreover there would be no problems regarding enforcement since recourse to arbitration depended on the agreement of the two States and in particular of that requesting the return.

96. One member of the group stressed that it was necessary to introduce in the first line of Article 9 the words "or other competent authorities" after the word "courts" given the assumption, especially as regards Article 5, that another authority might be competent. Another member however expressed concern at the inclusion of such language since all kinds of judicial decisions might be taken during the course of the dispute and he was hesitant to open a door of this kind since those cases where another authority would be competent were relatively few.

Article 10

97. One member of the group suggested that the present wording of this provision which permitted States to go further than that which was provided for in the draft Convention might give the impression that the requesting State could eliminate or restrict the right to compensation of the person

in possession of the object, which was not the meaning attached to it by the group. To avoid this erroneous interpretation he proposed adding the word "addressed" after the word State at the beginning of the paragraph.

98. Another member suggested that two distinct questions were at issue here. As regards the words "addressed State", the interpretation was correct but not in connection with the second part. The text provided that any State Party could extend the protection accorded by it so as to cover the situation of the 1970 Convention, that is to say one in which the requesting State or the State addressed already gave greater protection than that offered by the draft Convention and it was not intended to alter the position. However, the situation contemplated by the previous speaker concerned only the second part of Article 10 ("by disallowing or restricting the right to compensation") and covered the case of a State addressed which would have no right to compensation, in particular when States requested the return of stolen objects without having to pay compensation, for example in the Common Law system. In that member's opinion therefore the paragraph should be divided into two parts so as to avoid the anomaly.

99. Some criticism was expressed of the language "may extend the protection accorded" and it was proposed adding the words "maintain" or "extend" so as to take account of the position of the States which already offered wider protection. One member also believed that the text would be improved if a reference were to be made to the 1970 Convention as had been suggested in connection with Article 2 of the draft.

100. Another member was of the opinion that it was not appropriate in this provision to speak of requesting States and addressed States and so as to make the text clearer he proposed the following formula: "Any State Party to this Convention may accord wider protection to a person ... in Article 2 (1) or to a requesting State under ...", the term "accord" signifying maintain or extend. In this way it would be clear that the requesting State could not invoke what it itself accorded as wider protection so as to require another State to grant the same extension, with the consequence that any wider protection would only be granted by a State in the position of addressed State.

101. The other members suggested that these proposals should be set out in written form so as to permit the group to examine the implications of the new draft before taking a stand on them.

Article 11

102. One member of the group drew the attention of a future drafting group to this article which precisely circumscribed the temporal scope of application of the draft Convention, pointing out that as at present drafted in the English version it seemed to say that a person was dispossessed by a criminal act or by the infringement of an export prohibition which was not a correct parallel construction as illegal export was not equivalent to dispossession. The text of the provision should therefore be modified to that effect.

103. The fact that this article took into consideration only situations arising after the entry into force of the future Convention gave cause for concern to another member of the group who believed that, on the contrary, the Convention should have retroactive effect. He was unhappy at the idea that an illegal act should become legal simply because it had been committed before the entry into force of the text, which was a way of approving illegal acts.

104. The first reaction of the other members of the group was to express their sympathy for this understandable concern which was of the greatest importance for developing countries in particular, but they were of the opinion that the deletion of such a provision would render the chances of acceptance by those States which would have to return cultural property virtually nil. They were of the opinion that it would be preferable to attempt to improve the situation for the future while recognizing that there existed problems relating to the past which still needed to be solved.

105. Furthermore, it was pointed out that there already existed a committee within Unesco, the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation which dealt specifically with these problems. The sixth session of that Committee had been held in Paris at the headquarters of Unesco in April 1989 and on that occasion it had adopted Recommendation No 15 in which it had expressed its satisfaction at the work accomplished by Unidroit and requested regular and full information regarding the progress made by the Unidroit study group.

106. The intention of the provision was to lay down ethical or moral principles for the exchange of cultural property and, with a view to the future, to bring to the attention of the importing countries those objects already in their country. The project was one of education which was a slow process. Another member supported this line of argument and pointed out that even if the text concerned only the future it would have an important

effect on practice generally and on judicial practice in particular as regards those objects which had previously been stolen or illegally exported. There were many examples of private law conventions which had not been ratified but which were considered to express the present state of public policy or international morality and which served as a reference point for judges even in those States which had not ratified them (as was for example the case with the 1970 Unesco Convention).

107. Some members of the group stated that they interpreted the extension provided for in Article 10 also in a temporal sense, that is to say that any State addressed which so wished could even apply the Convention retroactively. They suggested that one might possibly consider expressly stating in Article 10 that the faculty to maintain or extend the protection accorded could be interpreted also from a temporal viewpoint.

108. So as to avoid the implication that the article recognized a *fait accompli* it was proposed mentioning this in the preamble of the future Convention and moreover a new drafting of the provision was proposed along the lines: "However it shall not affect any provisions in this respect which were in force at the time of the dispossession or of the violation prior to its entry into force". One member stated that he was satisfied with this proposal whereas others expressed hesitations and preferred to refer it to a drafting committee. They were of the opinion that the present language met the preoccupations of those concerned with the past as well as of those who did not wish to sanction existing practice.

Item 3 on the agenda - Other business

109. The group decided that its third session should be held at the seat of the Institute from 22 to 27 January 1990.

110. The President declared the session closed at 1.00 p.m. on 17 April 1989.

ANNEXE I
APPENDIX I

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LIST OF PARTICIPANTS

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APPENDIX II

AGENDA

1. Adoption of the draft agenda (S.G./C.P. - Ag. 2)
2. Feasibility and desirability of drawing up uniform rules relating to the international protection of cultural property (Study LXX - Docs. 1 to 11)
3. Other business

PRELIMINARY DRAFT CONVENTION
ON THE RESTITUTION AND RETURN OF CULTURAL OBJECTS

Article 1

(1) For the purpose of this Convention, "cultural object" ⁽¹⁾ means any material object created by man of cultural, artistic, historical, spiritual or ritual significance.

(2) This Convention governs neither:

(a) the question of ownership of cultural objects or that of other rights which may exist over them; however, a possessor who has been obliged to make restitution of a cultural object to a person ⁽²⁾ who has been deprived of possession or who, in conformity with Article 4(1), has returned it against payment of compensation to the State of origin may no longer assert ownership or any other real right thereover; nor

(b) the liability of experts, auctioneers or other sellers of cultural objects.

Article 2

(1) When a person has been dispossessed of a cultural object by theft, conversion, fraud, intentional misappropriation of a lost object or any other culpable act assimilated thereto ⁽³⁾ [by a court acting under

(1) The definition in paragraph (1) is based on that contained in Mr Loewe's preliminary draft (hereafter referred to as "the Loewe draft"). It has been amended to take account of certain observations made at the first session of the group, in particular the replacement of the notion of "cultural property" by "cultural object".

(2) It has been assumed that the word "person" includes a State making a claim for restitution under Article 2.

(3) The Secretariat experienced difficulty in drawing the distinction between theft and other culpable acts to which attention was drawn at the first session of the group for while it is true that Article 10 permits Contracting States to go further than does the Convention in protecting a dispossessed person, thus preserving the application of the nemo dat rule in those jurisdictions in which it obtains, it is not immediately apparent how, unless Article 2 were to be restricted to cases of theft stricto sensu, any meaningful rule could be laid down in relation to fraud, conversion etc. falling short of the "right to payment" which would, in any event, give full protection to the investment of the purchaser in good faith. A possible solution might lie in the establishment of different rules as to time-bar under Article 2(3).

Article 9] [by the law of the State where the act was committed]⁽⁴⁾ the possessor of any such object shall return it to the dispossessed person [when the possessor fails to prove that:

(a) he took the precautions normally taken when acquiring such an object, having regard in particular to its nature and provenance, the qualities of the person from whom he acquired it (the transferor) or his trade, any special circumstances in respect of the transferor's acquisition of the object known to the possessor, the price, or provisions of the contract and any circumstances in which it was concluded; and

(b) he consulted any register of cultural objects which have been stolen or of which another person has been otherwise dispossessed by a culpable act which the possessor could reasonably have been expected to have consulted.

(2) The conduct of a predecessor in possession from whom the possessor has acquired the object by inheritance or otherwise gratuitously shall be imputed to the possessor]⁽⁵⁾.

(3) The preceding provisions of this article shall only apply if the action for restitution is brought before a court in respect of a cultural object mentioned under paragraph (1) within [thirty] years of the dispossession.

Article 3

(1) Any dispossessed person who is entitled to restitution of a cultural object shall at the same time, but at his own option, compensate the possessor either for the price paid by the latter or by his predecessor under Article 2(2) or for a sum corresponding to the actual value of the object at the place where it is located.

(4) Opposing views were expressed on this question at the first session of the group.

(5) The Loewe draft seems to have started out from the assumption that the cultural object would not be returned to the dispossessed person if the possessor had taken all the necessary precautions (c.f. the rule contained in Article 7 (b)(ii) of the 1970 Unesco Convention). If, however, the "right to payment" solution were to be adopted in all cases then some at least of the square-bracketed language in Article (1) could be embodied in Article 3(2) and that of Article 2(2) elsewhere in Article 3.

(2) Paragraph (1) of this article shall not apply and no compensation shall be due when the [dispossessed person proves that the]⁽⁶⁾ possessor or his predecessor under Article 2(2) acquired the object with knowledge that it had been the subject of a culpable act or in circumstances in which a reasonable purchaser should at least have had doubts in that regard.

Article 4

(1) When a cultural object has, notwithstanding a prohibition, been exported from the territory of a Contracting State (the requesting State) [in which it was created]⁽⁷⁾ that State may request the court of a State acting under Article 9 (the State addressed) to order the return of the object to the requesting State on condition that:

- (a) the object has, at the place where it is currently located, a value in excess of [25,000] Special Drawing Rights, or
- (b) the requesting State proves that the removal of the object from its territory significantly impairs one or more of the following interests:
 - (i) the physical preservation of the object or of its context,
 - (ii) the integrity of a complex object,
 - (iii) the preservation of information,
 - (iv) the use of the object by a living culture,
 - (v) the great cultural importance of the object for the requesting State,
 - (vi) an arrangement between the requesting State and the former possessor of the object under which the latter agreed, in return for certain advantages, to make the object accessible to the public.

(6) The square-bracketed language indicates that a decision on the question of the burden of proof has still to be taken.

(7) The language in square brackets was criticized on the occasion of the first session of the study group and the decision as to its retention will determine the fate of Article 4(2)(c).

(2) The provisions of paragraph (1) shall not apply when:

- (a) the object was exported during the lifetime of the person who created it or within a period of [fifty] years following the death of that person; or
- (b) no claim for the return of the object has been brought before a court within a period of [five] years as from the time when the requesting State knew or ought reasonably to have had knowledge of the identity of the person in possession of the object, and in any case within a period of [twenty] years as from the date of the export of the object [; or
- (c) the object has a closer link with the culture of a State other than that on whose territory it was created].⁽⁸⁾

(3) When considering a request for the return of a cultural object under paragraph (1) a court of the State addressed may ask the requesting State to provide any information relating, *inter alia*, to the ownership and location of the object prior to its export and its intended location on its return.⁽⁹⁾

Article 5

(1) When the requesting State proves that the possessor of a cultural object exported in violation of a prohibition [or his predecessor under Article 2(2)]⁽¹⁰⁾ had knowledge, when exporting or acquiring the object, of the export prohibition or that a reasonable person should at least have had doubts in that regard,⁽¹¹⁾ the possessor shall be required to return

(8) See note (7) above.

(9) This provision has been introduced for discussion as a provisional solution to the problem of non-pecuniary conditions which might be imposed on the return of cultural objects.

(10) The group may wish to consider whether the rule applicable to theft and other culpable acts in Article 2(2) imputing knowledge to the possessor should also be applied to an "innocent purchaser" of illegally exported cultural objects.

(11) The general structure of Article 5 has in effect transposed the solution proposed in the Loewe draft in respect of the purchaser in "bad faith" to that of the bona fide purchaser the sense that he had no actual or constructive knowledge of the violation of the export prohibition. It will therefore be for the group to decide whether the burden of proving the state of knowledge of the possessor should be placed on him or on the requesting State. Similarly it may be necessary to develop the notion of the doubts of a reasonable person, as has been done in Article 2(1), by specifying the precautions which have to be taken.

the object to the requesting State and shall be entitled to [no compensation] [such compensation from the requesting State as may be determined by the court of the State addressed].⁽¹²⁾

(2) The possessor of a cultural object who, when exporting or acquiring it, neither had knowledge of the fact that it had been exported in violation of a prohibition nor should at such time have had any reasonable doubts in that regard may, at his option, require that the requesting State pay him a sum corresponding to the amount which would be due by a dispossessed person in conformity with Article 3(1), or transfer the object, for reward or gratuitously, to a person of his choice in the requesting State. [In the latter case, the requesting State shall undertake neither to confiscate the object nor to interfere in any other way with the possession of the person to whom the object has been transferred or of his successors under a universal or individual inheritance.]⁽¹³⁾

[Article 6

A request for the return of a cultural object under Article 4 may be refused if the granting of that request is manifestly incompatible with the public policy ("ordre public") of the State addressed.]⁽¹⁴⁾

Article 7

(1) The Special Drawing Rights referred to in Article 4(1)(a) are those defined by the International Monetary Fund. Such rights shall be converted into the national currency of the State of the court with jurisdiction under Article 9 in accordance with the value of that currency on the date on which the court is seized of the case and in accordance with the method of valuation applied by the Fund for its operations and transactions.

(12) The alternative offered by the language in square brackets reflects differences of opinion expressed within the group at its first session.

(13) The language in square brackets was the subject of lengthy discussion at the first session of the group. It had however been considered on the assumption that the possessor had actual or constructive knowledge of the violation of the export prohibition and might give rise to less concern in the case of a possessor who had no such knowledge.

(14) A view was expressed by some participants at the first session of the group that it was to be understood that a State addressed might refuse the return of a cultural object on the grounds of "ordre public" although no decision was taken as to whether a provision to that effect should be included in any future instrument. The text of Article 6 is based on that of Article 5 of the Hague Convention on Celebration and Recognition of the Validity of Marriages of 14 March 1978.

(2) the value of the national currency, in terms of Special Drawing Rights, of a State which is not a member of the Fund shall be calculated in a manner determined by that State. ⁽¹⁵⁾

Article 8

(1) In determining the value of a cultural object for the application of Article 4(1), regard shall be had to the price applied in respect of a comparable object at the place where the object is located [, and in particular to the price fetched at auction sales]. ⁽¹⁶⁾

(2) For the application of Articles 2(1) and 4(1), a cultural object forming part of a collection, set or series or which comes from the same collection, set or series shall be considered to be a single object when the same person has been deprived of possession of it or when its export has violated a prohibition, and when it is in the possession of a single person.

Article 9

The courts either of the State where the possessor of the cultural object has his habitual residence or those of the State where the cultural object is located shall, at the option of the claimant, have jurisdiction over claims governed by this Convention. The parties to the dispute may however agree ⁽¹⁷⁾ upon another jurisdiction or submit the dispute to arbitration.

(15) Unlike the Loewe draft, which contemplated the possibility of the value of a cultural object being expressed in Swiss francs, the Secretariat would propose that the unit of account of the Special Drawing Right alone be taken into consideration as this is predominantly the unit to which reference is made in recent international conventions.

(16) In view of the objections made by some members of the group to the concept of the monetary value of cultural objects and the offence which might be caused thereby to certain communities the concluding words of paragraph (1) have been placed in square brackets.

(17) This article (Article 8 of the Loewe draft) was not discussed in detail by the group at its first session. Given however the relationship between this article and other provisions of the present draft, it might be necessary to review the wording of those provisions insofar as Article 9 contemplates the possibility of an action for restitution or return being brought before a court of a Contracting State when the possessor of the object has his habitual residence in that State.

Article 10

Any State Party to this Convention may extend the protection accorded to a person dispossessed of a cultural object in the circumstances described in Article 2(1) or the rights accorded to a requesting State under Articles 4 and 5 by disallowing or restricting the right to compensation of the person in possession of the object or in any other manner.

Article 11

This Convention shall apply only in respect of a cultural object of which a person has been dispossessed by a culpable act or in violation of an export prohibition after the entry into force of the Convention.

APPENDIX V

ARTICLES 2 AND 3
THEFT AND ASSIMILATED ACTS

ISSUE I

Variant 'A'

Articles 2 and 3 applicable to theft and all assimilated acts.

Variant 'B'

Articles 2 and 3 applicable only to theft.

Variant 'C'

Different treatment under Articles 2 and 3 of theft and assimilated acts.

ISSUE II

Variant 'A'

All precautions taken by purchaser - no restitution to dispossessed person.

Variant 'B'

As variant 'A' but no compensation when purchaser has failed to take all precautions.

Variant 'C'

Restitution to dispossessed person in all cases - compensation of purchaser when all precautions taken.

Failure by purchaser to take all precautions - restitution to dispossessed owner - purchaser's right to compensation dependent on its degree of negligence (burden of proof).

No compensation of purchaser when it has failed to take all precautions (or possibly compensation dependent on degree of negligence and if so burden of proof).

ISSUE III

Variant 'A'

Equitable compensation payable to purchaser but to exceed neither price paid by the purchaser or its predecessor (plus accrued interest subsequent to the purchase) nor actual commercial value of object at place where it is located.

Variant 'B'

Equitable compensation payable to purchaser.

Variant 'C'

Compensation payable to purchaser on basis of commercial value of object at its place of origin.

ISSUE IV

Question of the compatibility of the future instrument with the 1970 Unesco Convention (especially Article 7 (b)(ii)).

APPENDIX VI

PROPOSAL BY MR CREWDSON

Article 4 (1) (b) (v)

Having regard to the extent and richness of the existing stock of heritage material of the requesting State whether in public or private ownership and the degree of uniqueness of the object, the object is of great cultural importance to the requesting State.

APPENDIX VII

PROPOSAL BY MR FRAOUA AND MR LALIVE

Article 4 (3)

To be admissible, the request shall contain [or be accompanied by] the indications necessary to enable the competent authority of the addressed State to judge whether the conditions laid down in paragraphs (1)(a) or (1)(b) are fulfilled.

In all cases, the request shall contain all useful information regarding the conservation, security and accessibility of the object after it has been returned to the requesting State.